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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 613

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

GEORGE R. TUTTLE,

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THE UNITED STATES OF AMERICA,
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SUPPLEMENTAL BRIEF FOR RESPONDENT.

By permission of the Court this supplemental brief, which is confined to a question of jurisdiction, is being filed. The proceedings contemplate a review of a decision of the United States Court of Customs and Patent Appeals relating to the proper dutiable value of imported merchandise. The action was originally commenced by the respondent's appeal to the United States Customs Court (authorized by section 501, tariff act of 1930, 19 U. S. C. 1501) for a review of the decision of the United States Appraiser of merchandise at the port of Seattle as to the proper dutiable value of such merchandise. In reviewing this appraisement a single judge of said United States Customs Court affirmed the appraised value. Thereafter his decision was reviewed by a division of three judges of

said court and his findings affirmed. Subsequently as authorized by said section 501 an appeal was taken to the Court of Customs and Patent Appeals "upon a question of law only". After decision by that court certiorari was granted. The statute governing the procedure in the Customs Court referred to above, and granting jurisdiction to the Court of Customs and Patent Appeals in such proceedings is as follows:

> SECTION 501. Notice of Appraisement—Reappraisement.
>
> The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value. The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this Act relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court and shall be assigned to one of the judges, who shall, after affording the parties an opportunity to be heard, determine the value of the merchandise. Reasonable notice shall be given to the importer and to the person designated to represent the Government in such proceedings of the time and place of the hearing, at which the parties and their attorneys shall have an opportunity to introduce evidence and

to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence. In finding such value affidavits and depositions of persons whose attendance cannot reasonably be had, price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government may be admitted in evidence. Copies of official documents, when certified by an official duly authorized by the Secretary of the Treasury, may be admitted in evidence with the same force and effect as original documents. The value found by the appraiser shall be presumed to be the value of the merchandise and the burden shall rest upon the party who challenges its correctness to prove otherwise.

The judge shall, after argument on the part of any of the interested parties requesting to be heard, render his decision in writing together with a statement of the reasons therefor and of the facts on which the decision is based. Such decision shall be final and conclusive upon all parties unless within thirty days from the date of the filing of the decision with the collector an application for its review shall be filed with or mailed to the United States Customs Court by the collector or other person authorized by the Secretary of the Treasury, and a copy of such application mailed to the consignee, or his agent or attorney, or filed by the consignee, or his agent or attorney, with the collector, by whom the same shall be forthwith forwarded to the United States Customs Court. Every such application shall be assigned by the court to a division of three judges, who shall consider the case upon the samples of the merchandise, if there be any, and the record made before the single judge, and, after hearing argument on the part of any of the interested parties requesting to be heard, shall affirm, reverse, or modify the decision of the single judge or remand the case to the single judge for further proceedings, and shall state its action in a written decision, to be forwarded to the collector, setting forth the facts upon which the

finding is based and the reasons therefor. *The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals upon a question or questions of law only within the time and in the manner provided for by section 188 of the Judicial Code, as amended (Section 310, title 28).*

In the light of recent decisions cited below counsel for respondent is inclined toward the view that the present proceedings constitute a "case" within the meaning of Article 3, Section 2 of the Constitution and therefore jurisdiction exists to review the decision of the court below. These decisions are as follows:

Old Colony Trust Company v. *Commissioner*, 279 U. S. 716;

Federal Radio Commission v. *Nelson Brothers*, 289 U. S. 266;

O'Donoghue v. *United States*, 289 U. S. 516;

Williams v. *United States*, 289 U. S. 553.

However, because of the decision of this Court in *Ex Parte Bakelite Corporation*, 279 U. S. 438, and certain language used in *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, counsel considers it his duty to bring to the Court's attention the question of whether jurisdiction exists, for the *Bakelite* case is the only ruling by this Court as to the character of a customs appeal.

The *Norwegian Nitrogen Products Company* case involved the issue of whether the United States Tariff Commission, in investigating the differences in costs of production of certain merchandise as authorized by section 315, tariff act of 1922, had given the petitioner the hearing prescribed by that law (p. 297). In deciding the point this Court reviewed the procedure and history of the Tariff

Commission and also referred, by way of illustration, to certain proceedings authorized by section 501 of said act which corresponds with section 501, tariff act of 1930. As to such reappraisement proceedings in the United States Customs Court this Court said (p. 315-6):

> To the external aids that are drawn from history and analogy and administrative practice there is to be added another that may be said to be internal, the aid to be derived from the wording of related sections. In the same tariff act that makes provision in these general words for a hearing by the Commission as a step in the development of the process of legislation, there is another section prescribing the remedy available to an importer after the legislative process has been completed, and the question is whether the merchandise has been properly appraised. Act of September 21, 1922, c. 356, sec. 501, 42 Stat. 966; 19 U. S. Code Sec. 381. The remedy in such circumstances is an appeal from the decision of the appraiser to the Board of General Appraisers. The Board shall assign the appeal to one of its members, who shall file reasonable notice of the time and place of hearing, "at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence." *This is the way that Congress spoke when it wished to attach to an administrative proceeding the incidents of a trial in court.*

Prior to the decision in the *Norwegian Nitrogen* case, *supra*, this court had occasion in *Ex Parte Bakelite Corporation, supra*, to consider with care the status of the Court of Customs and Patent Appeals. The issue as presented by counsel was whether a review by said court of a finding of the United States Tariff Commission, authorized by section 316, tariff act of 1922 (relating to unfair competition or acts) was a "case" or "controversy" within the mean-

ing of Article III of the constitution. All three parties concerned argued that the court was a constitutional court, but it was held (p. 460) that the court is a legislative and not a constitutional court and therefore that it was unnecessary to decide whether the proceeding then pending in the Court of Customs and Patent Appeals under Section 316 was a case or controversy.

In reaching its conclusion this court described the general jurisdiction and function of the Court of Customs Appeals as follows (p. 457-9):

> Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel. The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and liquidating and collecting customs duties. But its functions, although mostly quasijudicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.
>
> The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. *The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws.* These matters are brought before it by appeals from decision of the Customs Court, formerly called the Board of General Appraisers. *The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.* True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without await-

ing disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

This summary of the court's province as a special tribunal, *of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws,* shows very plainly that it is a legislative and not a constitutional court.

* * * * * * *

But the argument is falacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.

The above quoted statement was made by this court in reaching its conclusion on the single point decided and therefore should probably not be considered as *obiter dictum* as was the statement in the same opinion (p. 460) characterizing the superior courts of the District of Columbia as legislative courts. (See *O'Donoghue* v. *United States*, 289 U. S. 516, p. 550, holding them to be constitutional courts). Further, in *Williams* v. *United States*, 289 U. S. 553, this court referred (p. 568) to its "fully considered opinion" in the *Bakelite* case "holding that the Court of Customs Appeals was a legislative court" and stated, p. 571:

Further reflection tends only to confirm the views expressed in the *Bakelite* opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them.

As the *Bakelite* and *Williams* decisions constitute this court's most recent expressions as to the type of jurisdiction exercised by the Court of Customs and Patent Appeals counsel considers it to be his duty to bring this matter to the court's attention for if, as stated in the *Bakelite* case, the appeals brought before said court "include nothing which inherently or necessarily requires judicial determination", it follows that the present proceeding is not a "case" and therefore this court does not have jurisdiction.

It is stated above that because of recent decisions counsel is inclined towards the opinion that the present proceeding is a "case". These decisions, however, do not relate to customs matters. As understood by counsel they hold that in determining whether a proceeding as a "case" it is not important that it was originally begun by administrative or executive determination; but, if, when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court, it is a case (*Old Colony Trust Co.* v. *Commissioner*, *supra*, p. 722). The term implies the existence of adverse parties whose contentions are submitted to the court for adjudication (*Chisholm* v. *Georgia*, 2 Dall. 431, 432, quoted in *Old Colony* case, p. 723). And it is not necessary for the court to have power to issue formal execution to carry its judgment into effect (Old Colony Trust Co., p. 725). Also, in *Federal Radio Commission* v. *Nelson*, *supra*, it was held that this court had jurisdiction to review a decision by the Court of Appeals of the District of Columbia because the decision of that court in the class of case considered was limited to review of the Commission on "questions of law." Further, in *Old Colony Trust Co.* v. *Commissioner*, *supra*, p. 724, it was said:

> In the case we have here, there are adverse parties. The United States or its authorized official as-

serts its rights to the payment by a taxpayer of a tax due from him to the government, and the taxpayer is resisting that payment or seeking to recover what he has already paid in taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise or judicial power.

Measured by these standards the present proceeding is a case. The Court of Customs and Patent Appeals limits its consideration to "questions of law" (Section 501, *supra*). The taxpayer and the government are adverse parties and recovery is sought of duties paid. The contention of the parties is submitted to the court for adjudication, and if the taxpayer prevails the Secretary of Treasury, acting under authority of Section 520 (1) tariff act of 1930, 19 U. S. C. 1520, is authorized to and does refund the duties either on liquidation or reliquidation of the customs entry. Article 3, section 2 also refers to "controversies as to which the United States shall be a party" but as this language was construed in *Williams* v. *United States*, *supra*, p. 577, as though it read, "controversies as to which the United States shall be a party, plaintiff or petitioner", it has no application here.

Because of these facts counsel is at loss to apply the language of the *Bakelite* decision quoted above to the present proceedings. However, as this decision represents a direct adjudication as to the functions of the Court of Customs and Patent Appeals in a proceeding such as is covered by this petition, motion is made that the petition be dismissed for lack of jurisdiction.

GEORGE R. TUTTLE,
Attorney for Respondent.

Except to point out that *Ex parte Bakelite Corp.*, 279 U. S. 438, involved an appeal to the Court of Customs Ap-

peals under Section 316 of the Tariff Act of 1922, after hearings and findings by the Tariff Commission and before transmission of its recommendation to the President, counsel for the United States do not desire to reply.

FRANCIS BIDDLE,
Solicitor General.

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1939.

The United States, Petitioner,
vs.
George S. Bush & Co., Inc.

On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

[May 20, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

The Court of Customs and Patent Appeals held invalid the Proclamation made by the President of the United States on May 1, 1934, increasing the duty on canned clams imported from Japan. 104 F. (2d) 368. We granted certiorari because of the importance of that decision to the administration of the flexible tariff provisions of the Tariff Act of 1930 (46 Stat. 590).

In compliance with § 336(a) of that Act, the Tariff Commission, in response to an application for an increased duty on canned clams, instituted an investigation in June 1932, gave public notice of the hearing, held the hearing in October 1932 and gave interested parties an opportunity to be present, to produce evidence, and to be heard. As a result of that investigation the Commission found that the statutory duty of 35% *ad valorem* on the foreign dutiable value[1] did not equalize the difference in the costs of production of the domestic article and the Japanese article. On such a finding the Commission was authorized by § 336(a) to recommend to the President an increase or decrease in the statutory rate but not in excess of 50 per cent; or in case the differences could not be equalized in that manner, it was empowered by § 336(b) to specify such *ad valorem* rate of duty based upon the American selling price[2] of the domestic article as it found necessary to equalize such differences. In the latter event, however, the statutory rate could not be increased. The Commission found that the rate of duty on foreign value which would be necessary to equalize the difference in costs exceeded the then existing statutory rate by more than 50 per cent. Accordingly it proceeded under § 336(b) to specify an *ad valorem* rate based on American selling price, and recommended to the President an increase in the duty, to be ef-

[1] Sec. 1, Sch. 7, Par. 721(b).
[2] As defined in § 402(g).

fected by assessing the rate of 35 per cent *ad valorem* on the American selling price.

It is provided in § 336(e) that the President "shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Proclamation referred to the report and findings of the Commission and concluded that the change in duty recommended was "in the judgment of the President" necessary for that purpose. After the President issued his Proclamation, respondent imported some canned clams and they were appraised on the basis of the American selling price. It was on an appeal for reappraisement pursuant to § 501 that the Proclamation was held invalid by the Court of Customs and Patent Appeals. Its invalidity, according to that court, flowed from the basis on which the Commission computed the Japanese cost of production. By § 336(e)(2) the Commission was authorized, when the cost of production of a foreign article was not "readily ascertainable", to accept as evidence thereof the "weighted average of the invoice prices or values for a representative period." The Commission took the weighted average of such prices for the period from December 1, 1930 to September 30, 1932. Those prices were in Japanese yen. Sec. 336 contains no provision for conversion of currency. But the Commission, in order to compare those prices with domestic costs, converted them into United States dollars, at the average rate of exchange for 1932. That period was selected because Japan went off the gold standard in December 1931 and the value of the yen in terms of United States dollars declined steadily from that date to November 1932.[3]

[3] The Commission in its report to the President, dated April 5, 1934, stated on this point:

"The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932."

The Court of Customs and Patent Appeals held that it was error to convert invoice prices for one period into United States dollars at the average rate of exchange for another period. In its view the phrase "weighted average of the invoice prices or values for a representative period" contained in § 336(e)(2) must be construed as though it read, "weighted average of the invoice prices or values in United States currency for a representative period." The government, however, urges that if the Commission were forced to take the conversion rate for the earlier period, to which it had to resort in order to obtain the invoice prices, it would use a rate which had merely an historical interest and which did not reflect the conditions which made desirable an increase in duties, viz. the depreciation in the value of the yen.

The determination of foreign exchange value was prescribed, in the procedure outlined by Congress, neither for the action of the Commission nor for that of the President.[4] There is no express provision in the Act that the rate of exchange must be taken for the same period as the invoice prices. To imply it would be to add what Congress has omitted and doubtless omitted in view of the very nature of the problem. The matter was left at large. The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930,[5] it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production.

The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for well over a century. See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 308 *et seq.*, for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission

[4] Sec. 522(b) provides that for "the purpose of the assessment and collection of duties" upon imports, foreign currency shall be converted at values proclaimed by the Secretary of the Treasury for the quarter in which the merchandise was exported. This section clearly has no application to the issue here, since it applies only to assessment and collection of duties—matters outside the functions and duties of the Tariff Commission.

[5] That section gives either party a right to appeal to the Court of Customs and Patent Appeals on "a question or questions of law only".

serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. In substance and to a great extent in form (*Norwegian Nitrogen Products Co.* v. *United States*, *supra*) the action of the Commission and the President is but one stage of the legislative process. *Hampton & Co.* v. *United States*, 276 U. S. 394. "No one has a legal right to the maintenance of an existing rate or duty." *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, p. 318. And the judgment of the President that on the facts adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin* v. *Mott*, 12 Wheat. 19; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1. As stated by Mr. Justice Story in *Martin* v. *Mott*, *supra*, pp. 31-32: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.

The other points raised are so unimportant as not to merit discussion.

Reversed.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.